



Access to Justice and the Right to Education for Children with Disabilities

**A report exploring barriers to access to justice in the context of
inclusive education in ten European Countries**

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Introduction

United Nations Human Rights Council (UNHRC) resolution 31/6 requests that the Office of the High Commissioner for Human Rights (OHCHR) prepare a study on article 13¹ of the Convention on Rights of Persons with Disabilities ((CRPD) guaranteeing effective access to justice for persons with disabilities). The study should be prepared in consultation with relevant stakeholders, including civil society organizations and organizations of persons with disabilities, and to present the study to the Human Rights Council before its thirty-seventh session.

Separately, through the "Schools for All" collaboration with the Mental Disability Advocacy Centre (MDAC, now "Validity"), DLA Piper has undertaken substantial comparative research into inclusive education (article 24 CRPD) in Europe. This research included, inter alia, a high-level investigation of access to justice in the context of inclusive education in several European jurisdictions (including Belgium, Bulgaria, Slovakia, Hungary, Romania, UK).

Accordingly, building on the work that has already been undertaken, DLA Piper has agreed to prepare a comparative report on the interaction between article 13 of the CRPD on access to justice and article 24 on inclusive education. The report will aim primarily to explore the difficulties, in practice, that claimants with disabilities (or their legal guardians) face in securing access to justice in the context of inclusive education. Particular attention will be paid to *obstacles and barriers inherent in the mechanism for seeking redress and instances where there are insufficient procedural accommodations*.

Methodology

For the purpose of preparing this report, just under 50 interviews were carried out across ten different European states (Belgium, Bulgaria, Czech Republic, Germany, Hungary, Netherlands, Romania, Russia, Slovakia and the UK). Interview subjects included:

- Lawyers with experience with inclusive education litigation either working independently or for public bodies;
- Civil society advocates from disabled persons organizations or human rights organizations;

¹ 1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.



- Members of parents' associations children with disabilities;
- Employees of public administrations;
- Academics; and
- Journalists.

All interviews were carried out on the basis of anonymity by lawyers working at the European offices of DLA Piper. Interview subjects were identified from desk-based research, from among the network of Validity and by making use of the "snowballing technique" (i.e. relying on recommendations of primary interviewees to develop a list of secondary interviewees).

Recommendations

Promoting the right to appeal and avoiding stigmatization

- States should ensure that schools and public administrations are required, by threat of financial sanction, to **inform children with disabilities and their parents or legal guardians, in sufficient detail, of their rights to appeal** decisions regarding the right to education for children with disabilities.
- States should ensure that legislation is introduced **prohibiting schools and public administrations from applying pressure on children with disabilities and their parents or legal guardians not to pursue legal redress or otherwise victimizing them during the redress process**. Furthermore, such legislation should provide for legal sanctions (preferably fines) where such prohibitions are not complied with.
- States should ensure that **administrative and judicial tribunals avoid applying labels to children with disabilities based on medical models of disability** that may stick with them throughout the redress process.

Making procedural accommodations

- States should ensure that **appeals to decisions denying the right to education for children with disabilities can be submitted online** and should ensure that online templates are provided for this purpose (and should generally lower the threshold for making appeals).
- States should ensure that children with disabilities and their parents or legal guardians can take advantage of **emergency or expedited proceedings and interim measures** which may reduce the waiting time for access to education or reasonable accommodations and that, if available, such measures are widely advertised.
- States should provide opportunities for children with disabilities and their parents or legal guardians to obtain, at the public expense, **independent expert opinions (either from medical, psychiatric and pedagogic experts or from disability and anti-discrimination law experts) that may be submitted as evidence during proceedings** on the right to education for children with disabilities.
- States should consider introducing legislation that would apply a **presumption that, where so claimed by a child or their parents or legal guardians, a school or public administration is deemed to have refused to admit a child with a**

disability or refused to make reasonable accommodations, until otherwise established.

- States should ensure that **public administrations do not have a monopoly on the procurement and provision of expert scientific opinions during proceedings** related to the right to education for children with disabilities.

Ensuring (adequate) representation and sufficiently well-trained lawyers and decision-makers

- States should ensure that there is **low threshold for any means test that applies to access to legal aid for children with disabilities** and their parents or legal guardians (ensuring access to legal aid for the greatest possible number of children - i.e. all but those in high-income families).
- States should ensure that **sufficient training is provided to lawyers and judges on disability law and anti-discrimination and the human rights model of disability**.
- States should ensure that **specialists (in disability law or anti-discrimination law) are invited to sit on judicial tribunals and decision-making bodies** that hear cases on the right to education for children with disabilities.
- States should **consider establishing specialist independent complaints mechanisms to resolve disputes related to the right to education for children with disabilities**, rather than relying on the general court system.

Minimizing conflict in the best interests of the child

- States should **consider relying on dialogue and mediation-based approaches (facilitated by NGOs) by default** to resolve disputes between parents or legal guardians and schools or public administrations.

Ensuring effective and enforceable remedies

- States should **establish special-purpose institutions mandated to mediate questions of reasonable accommodation** (vis-à-vis scope/substance) and pursue the best interests of the child by liaising with local, regional and national administrations.
- States should **impose financial sanctions on schools and public administrations that fail to deliver remedies** awarded by administrative and judicial tribunals.

Relevant International Human Rights Law Standards

Under Article 13 of the CRPD, states have a duty to provide access to justice for persons with disabilities on an equal basis with others. This includes the provision of *procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including during preliminary stages*. Furthermore, in order to help to ensure effective access to justice for persons with disabilities, *states are required to promote appropriate training for those working in the field of administration of justice, including police and prison staff*.

In addition, under Article 24 of the CRPD, governments have an obligation to fulfil the right of every child, including all children with disabilities, to access education on an equal basis with others. This obligation includes providing an inclusive education system at all levels, and ensuring as part of this education system that reasonable accommodation to an individual's requirements is provided. The Committee on the Rights of Persons with Disabilities ("the Committee"), the central body monitoring the implementation of the CRPD, has provided further guidance on these key aspects of the obligations under Article 24 in its General Comment 4 on the Right to Inclusive Education.

In realizing the right to education under Article 24 of the CRPD, governments must ensure that persons with disabilities receive the support required to facilitate their effective education.² According to the CRPD Committee (General Comment 4), this obligation requires states parties to introduce a comprehensive and coordinated legislative and policy framework on inclusive education.³

Reading article 24 of the CRPD and General Comment 4 in conjunction with article 13, we can conclude that a comprehensive and coordinated legislative and policy framework on inclusive education must include, inter alia:

1. The wide dissemination and advertisement of information about how to challenge denial or violations of the right to education among persons with disabilities (with the involvement of Organizations for Persons with Disabilities).⁴
2. A justice system which understands how to accommodate persons with disabilities (in an age-appropriate manner) and is capable of addressing disability-based claims.⁵
3. Measures to protect victims of discrimination against victimization during the redress process.⁶

² CRPD art 24(2)(d).

³ General Comment 4, paras 50, 61.

⁴ General Comment 4, para 63.

⁵ General Comment 4, para 63.

⁶ General Comment 4, para 30

4. Independent, effective, accessible, transparent, safe and enforceable complaints mechanisms and legal remedies in cases of violations of the right to education.⁷
5. Legislation to guarantee all persons with disabilities, including children, the right to be heard and their opinion given consideration within the education system, the justice system and more broadly in relation to all procedures and matters affecting their right to education.⁸

In the remainder of this report we will group our findings around four of the above themes, namely: the wide dissemination and advertisement of information about how to challenge denial or violations of the right to education among persons with disabilities, a justice system which understands how to accommodate persons with disabilities; measures to protect victims of discrimination against victimization during the redress process; and independent, effective, accessible, transparent, safe and enforceable complaints mechanisms and legal remedies.

⁷ General Comment 4, para 63.

⁸ CRPD art 7(3) read in conjunction with General Comment 4, paras 50, 61.

Findings

I. Wide dissemination and advertisement of information about how to challenge denial or violations of the right to education among persons with disabilities

Obstacles

Right across the ten surveyed jurisdictions, our interview respondents reported **information barriers** impeding the ability of children with disabilities (and/or their parents or legal guardians) to challenge denials or violations of the right to education for persons with disabilities.

Where children with disabilities were being denied access to inclusive education and/or reasonable accommodations (either due to the decision of an expert body, public administration or school), our interview respondents reported that parents or legal guardians are often insufficiently well-informed about their rights to appeal. This may be because:

- They are not officially notified of their right to appeal in the letter informing them about the relevant decision.
- They are officially notified of their right to appeal in the letter informing them about the relevant decision, however, insufficient supporting information is provided.
- They are officially notified of their right to appeal in the letter informing them about the relevant decision, however, the deadline to appeal is very tight (e.g. 10 to 15 days) and by the time they become fully aware or

Case Study: Belgium (Flemish Community)

"In a case of a refusal [of the right to inclusive education], parents are informed that they can [appeal] but very often the school staff, the school Director or the [Pupil Guidance Centre] will try to dissuade them by saying "It is not worth it... This is not going to get you anything... You have no chance to win...". For example, a child with Down Syndrome placed in an ordinary kindergarten was denied access to that school for the year after. Parents have tried to convince the school but are very often confronted [by] an intimidating adversary... There are [also] a lot of cases of implicit and silent refusal which [may] disarm the parents to take the case any further."

sufficiently organized such that they can appraise themselves of their rights, the deadline has passed.

- They are only informed about the relevant decision verbally (sometimes by schools or public administrations actively trying to avoid furnishing hard evidence of decisions denying access to inclusive education/ reasonable accommodations) and, as such, information about the right to appeal is not communicated or, in the alternative, they are misinformed about their right to appeal or the likelihood of success.
- They are informed about the relevant decision only implicitly and subtly dissuaded and discouraged from doing anything about it.
- (Particularly in small towns and rural areas) they are notified of their right to appeal (either in written form or verbally), however, they are dissuaded and discouraged from pursuing their right to appeal. For example, parents or legal guardians may be pressured to accept decisions of expert committees and public administrations recommending that their child be placed in a segregated school.

Good Practices

It is important to note that our interview subjects also described some good practices such as:

- Legal requirements that all decisions on the right to education be communicated in written form and provide sufficient information about appeals (both the process and the practicalities); and
- Reasonable timeframes for appeal (e.g. 60 days).

II. A justice system which understands how to accommodate persons with disabilities

Obstacles

Our interview subjects revealed a range of barriers for persons with disabilities inherent to the mechanisms and procedures for securing legal redress. Some of these barriers are easy to remove, others are systemic issues with the adversarial process in general and thus more complicated to negotiate. Below we will divide these barriers into: procedural barriers; barriers related to representation; barriers related to the judiciary; and systemic barriers.

Procedural Barriers: a number of procedural barriers were identified including easily remediable barriers such as *requirements that appeals are made in person*. This often means that children with disabilities (more likely their parents or legal guardians) may be required to travel in person to the relevant public office (sometimes over 100 kilometers away) to register an appeal in person. Another such barrier that could be easily removed (already mentioned above) is excessively short deadlines for appeals to be made (i.e. 15 days or less).

Two, somewhat more complex, procedural barriers related to the *availability of interim measures* and *difficulty of securing and introducing evidence*.

Interviewees from several jurisdictions reported that in relation to proceedings regarding the rights to inclusive education (more narrowly, access to mainstream schools for children with disabilities) and reasonable accommodations, there are no mechanisms for emergency/expedited claims and no provision for interim or precautionary measures (or they exist but are unused in cases on disability and the right to education). The result of this is that children with disabilities may not be able to attend mainstream schools and may need to spend several months (sometimes even years) out of school or being home-schooled while they wait for procedures to conclude. Alternatively, such children may have to go months or years without reasonable accommodations thereby significantly reducing the quality of the education they are receiving or making it impossible for them to benefit from education at all.

Interviewees also identified a range of formal or informal procedural obstacles related to evidence including:

- *Excessively high evidentiary burdens created by a lack of equality of arms between the parties.* Specifically, public administrations may secure expert scientific opinions regarding the condition of a given child and the ability of that child to successfully participate in mainstream schooling or the scale of any accommodations that may be required. However, parents or legal guardians of children with disabilities are typically unable to procure expert opinions of their own to counter the arguments of the relevant public administration. This may be because they cannot afford to retain experts for that purpose or they cannot identify suitable experts.
- *Public monopolies on the provision of expert scientific opinions.* A problem related to the one described above is the situation where judicial or administrative tribunals will only accept expert scientific opinions issued by or procured by the relevant public administration i.e. the parents or legal guardians are prevented from introducing their own expert scientific evidence making it impossible for them to refute the position of the public administration.

- *Difficulty of securing necessary evidence from schools/public administrations.* As briefly noted above, schools or other relevant public administrations may intentionally avoid communicating their position in written form meaning that parents or legal guardians of a child with a disability have no way of substantiating or conclusively proving that a school or public administration refused to admit the child or provide reasonable accommodations. Beyond this, it was reported that in some cases schools provide a purely superficial education to children with disabilities (e.g. giving them good grades to pass them on as quickly as possible to another institution). This is apparently a tactic adopted by schools to dissuade/prevent parents or legal guardians from taking legal action (i.e. where there is no formal breach of the right to inclusive education, parents or legal guardians can do little about it due to a lack of evidence).

Barriers related to representation: another set of barriers to securing legal redress for children with disabilities - in the context of inclusive education - relate to the difficulty of obtaining legal representation. The core issue is that parents or legal guardians of children with disabilities are unable or otherwise uninclined to retain lawyers to represent them in proceedings against schools or public administrations. There are a number of reasons for this including:

- The relevant family does not qualify for legal aid and retaining a lawyer is too expensive.
- There are insufficient lawyers who are well trained either with respect to disability law or with respect to the relevant administrative law/ legal proceedings.

The result is that parents or legal guardians often end up representing themselves (insofar as they decide to pursue legal redress at all). This creates a serious inequality of arms between the parties. Firstly, before official proceedings are commenced, schools and public administrations may not take parents seriously where they have not retained a lawyer and may exert pressure on them not to pursue access to justice. Secondly, once proceedings have started, parents or legal guardians who have no experience or knowledge of the judicial system may be pitted against (sometimes very experienced) lawyers retained by schools or public administrations.

Barriers related to the judiciary: a further set of barriers to securing legal redress for children with disabilities relate to the judiciary and more specifically gaps in the knowledge of the judiciary or relevant decision makers.

The central problem is that *judges (particularly in lower courts and provincial courts) are not well versed in disability law (and the CRPD in particular) or anti-discrimination law*. Accordingly, they may view cases related to inclusive education or reasonable accommodation narrowly, in light of light of compliance with administrative procedure (giving discretion to schools and public administrations) rather than as raising human rights questions. This gives rise to the related problem that *judges, not appraised in disability law and anti-discrimination law, may give undue weight to the opinions of "medical, psychiatric or pedagogic experts" retained by schools and public administrations who propound a medical model of disability rather than a human rights model*. The outcome is that *courts are taking decisions on medical grounds rather than human rights grounds*.

Both of these problems are exacerbated by the fact that *judges often have little or no local jurisprudence to rely on when deciding cases related to inclusive education and reasonable accommodation*.

Systemic barriers: a final barrier to securing legal redress relates to the adversarial nature of the judicial process itself. In the context of the rights to inclusive education and reasonable accommodation, it seems that children with disabilities and their parents or legal guardians may be structurally conditioned to avoid seeking redress. There are, in most jurisdictions, a lack of available places for children with disabilities in

Case Study: Romania

"For example, a child with Down Syndrome was denied access to [a] mainstream school even though he had a placement. Whilst school[s] may not have [the] right to reject [children] in such a way, they still do either via an outright rejection, [by] claim[ing] that there are no places or they accept the child for a short period of time [and] then request an evaluation (which in turn almost always results in a negative outcome for the child).

The child in question was rejected by three further schools but accepted by the fourth on the condition that if he was not smart enough he would be transferred to a special school which subsequently happened. The case went directly to the court who invited a psychiatrist to assess the child's intelligence. The psychiatrist stated that a child with an IQ of 68 would never be able to learn or meet the standards required by a mainstream school, quoting a Russian defectology manual (on redressing defects), that persons with IQ under 80 are prone to be violent/aggressive to other children and people. Therefore the child in question [was deemed] a threat and [did] not [meet] the standards required [by] the school and [was required to be placed] in a safe environment within a special school. Such an evaluation is absurd at best, but evidences the types of assessment the court would consider in disability cases."

mainstream school and a lack of funding for reasonable accommodations. Accordingly, due to a fear of foreclosing opportunities, a fear that their child may be stigmatized and the desire not to antagonize the school, public administrators or medical, psychiatric and pedagogical experts, *parents or legal guardians of children with disabilities seem to systematically avoid pursuing legal redress in the face of denials of the right to education.* These fears are particularly pertinent where the only legal recourse is to pursue a claim against the school itself (rather than the local or regional administration, for instance). Furthermore, such fears are of course exacerbated by the power imbalance between the parties. *Many of our interviewees reported that, in practice, pursuing legal redress does indeed make attendance at the relevant school by the pupil untenable.* We were repeatedly told that "taking a case can do more harm than good" insofar as it may irreparably damage the relationship with the school in question.

Good practices

Our interviewees also identified several good practices representing accommodations by the judicial system for persons with disabilities. These included:

- Allowing appeals to be sent online and providing online templates for this purpose (generally lowering the threshold for appeals).
- Providing for emergency or expedited proceedings and interim measures which can reduce the waiting time for access to education or reasonable accommodations from years to months.
- Allowing specialists (in disability law or anti-discrimination law) to sit on judicial tribunals and decision-making bodies or establishing specialist independent complaints mechanisms to resolve such disputes rather than relying on the general court system.
- Systematically collecting data on user

Case Study: Hungary

"In one case for example a mother of a boy with a severe disability who attended a special school asked help from us [an NGO] after having exhausted all possibilities with the school to negotiate. The special school did not want to provide education for the boy any more (after some years in the school) as he was wearing a diaper and the school said that they were not able to provide assistance in the future due to the low number of assistant employees. Although the school was a special institution with the obligation in its articles of association to care for children with severe disabilities, they denied the client's right to education. After a rather lengthy correspondence and the active participation of the mother in negotiating with the school we could close the case successfully without taking further legal steps."

experience (of the justice system) from persons with disabilities.

- Using dialogue and mediation-based approaches (sometimes facilitated by NGOs) by default to resolve disputes between parents or legal guardians and schools or public administrations. Mediation, it seems, can also be much swifter than judicial and administrative proceedings in addition to being less adversarial.
- Encouraging children to introduce themselves during the course of proceedings and requiring statements setting out the child's wishes.

III. Measures to protect victims of discrimination against victimization during the redress process

Obstacles

Our interviewees from right across Europe revealed that the judicial system can and must do much more to protect children with disabilities and their parents or legal guardians from victimizations during the redress process.

Victimization seems to be more common in smaller towns and rural areas and is chiefly targeted at exerting pressure on parents or legal guardians not to seek legal redress where rights to inclusive education or reasonable accommodations have been denied. Victimization may take many shapes and forms, including:

- Threats of terminating parental rights made by schools or public administrations (i.e. by falsely reporting abuse/neglect);
- Threats of humiliation made by schools or public administrations (e.g. in one instance, fabricating the requirement for a legal guardian to take an STD test prior to the enrolment of the child and threatening to make public the failure to take the test);

Case Study: UK

"two parents from Hounslow who we [an NGO] have worked with, from a BME [black and minority ethnic] community - these parents are black [...] They challenged the [Local Authorities'] decision that their child should be in a special school. In this instance, the parents were threatened with having their children removed under child protection legislation, with the administration claiming the parents weren't acting in the best interests of their child, simply because they challenged the decision to send the young person to a segregated school."

- Convincing the parents or legal guardians of a child with disabilities that it will be unfair to the other children of the school if their child attends (i.e. by diverting resources away from the other children);
- Parents of other children in the relevant school grouping together to exert pressure on the parents or legal guardians of a child with a disability not to matriculate their child (e.g. through signing petitions); and
- Applying labels to children with disabilities based on medical models of disability that stick with them throughout the redress process.

A further and exacerbating problem is that there often seems to be no or otherwise ineffective sanction for such victimization.

Case Study: Russia

"Just yesterday I [a lawyer] advised a woman from the Stavropol Territory who has a child with Down Syndrome. The school management refused to fulfil the recommendations of the PMP [psychological, medical and pedagogical] Commission with respect to a specifically tailored learning program. They recommended the mother should take the child to a special school and even invited a professor to a meeting with parents who have children with disabilities and the professor delivered a lecture to the parents persuading them that their children must study in special schools separately from children without disabilities. As if that interfered with the studies of children without disabilities."

IV. Independent, effective, accessible, transparent, safe and enforceable complaints mechanisms and legal remedies

Obstacles

Our interviewees also identified a range of barriers to access to justice in the context of the rights to inclusive education and reasonable accommodation that can be collectively described as a **lack of effective and enforceable legal remedies**. These included, for example:

Issues around the scope of legal remedies

Interviewees reported that:

- Limited attention is paid by judicial and administrative tribunals to the scope and substance of support that should be provided in the form of reasonable accommodations;
- It can be incredibly difficult to appeal decisions in relation to the scope or substance of support;
- Judicial and administrative bodies often make use of one-size fits all remedies that are not tailored to the specific individuals in question; and
- Pressure may be exerted by schools and public administrations on children with disabilities and their parents or legal guardians to accept whatever accommodation is provided, no matter how insufficient.

Issues around the implementation of legal remedies

Interviewees reported that:

- There is limited ability to appeal failures to provide reasonable accommodations where such accommodations had been promised and were not forthcoming;
- Tribunals are typically not in a position to effectively police compliance with judicial and administrative decisions and local administrations cannot always be trusted to do so either;
- Sanctions placed on schools and local administrations are often not severe enough to avoid repeat infringements; and
- Even where remedies are granted and provided by the school, there are no legal guarantees in place to ensure the quality of the education being provided. For instance, if support teachers are provided there is no guarantee that they will be suitably qualified. In this fashion, schools may embrace a purely formal compliance with the right to education, providing no substantive enjoyment of the right.

Case Study: Hungary

"For example, there was an autistic girl who could either go to a nearby school with no support or a segregated school for children with extreme cases of disabilities. The parents moved home to attend a different school but after 6 months the school withdrew the therapy that was being provided. The mother spoke with the school, the Klebersberg [i.e. Klebelsberg Institution Maintenance Centre - a body which has centralized responsibility for all state-funded schools in Hungary] and the police with no success. She then submitted a complaint to the Ombudsperson who concluded that this was absolutely against the child's right to education. However, this was a non-binding decision and had little impact."

Good practices

Our interviewees did note a handful of good practices such as:

- The establishment of special-purpose institutions mandated to mediate questions of reasonable accommodation (*vis-à-vis* scope/substance) and pursuing the best interests of the child by liaising with local, regional and national administrations.
- Imposing financial sanctions on schools and public administrations that fail to deliver remedies awarded by administrative and judicial tribunals.

Conclusion

This research unveiled a number of barriers to access to justice for children with disabilities who have been denied the right to education. A striking commonality across all of the studied jurisdictions was that the most vulnerable children often had no one willing or capable to advocate for their rights and, as such, the most vulnerable children were the least likely to have their rights protected. Issues around access to justice are exacerbated across the board where, for example, children come from poor or minority backgrounds, where they reside in rural or provincial areas or where their parents have disabilities themselves. The right to education for children with disabilities must be enjoyed on a basis of non-discrimination and our research sadly revealed that across Europe this is far from being the case. It is hoped that the recommendations set out at the top of this report can promote better practice among states in this regard and that this report has shed some light on the obstacles that stand in the way of securing access to justice for children with disabilities where their right to education has been denied.



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